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BEFORE THE ARIZONA CORPORATION C

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AZ CORP COMMISSION  
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**COMMISSIONERS**

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SWING FIRST GOLF, LLC,

COMPLAINANT,

VS.

JOHNSON UTILITIES, LLC,

RESPONDENT.

DOCKET NO. WS-02987A-08-0049

**STAFF'S RESPONSE TO SWING FIRST  
GOLF MOTION TO WITHDRAW**

The Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") files its response to the request of Swing First Golf, LLC. ("SFG") to withdraw its complaint against Johnson Utilities, LLC ("Johnson"). For the reasons set forth below, Staff has no objection to the request by SFG.

While there is not specific rule governing the voluntary dismissal of a complaint by a complainant, Arizona Administrative Code R14-3-101(A) states that in cases where Commission rule or regulation does not set forth a procedure, the Arizona Rules of Civil Procedure ("ARCP") shall govern. The ARCP governing the voluntary dismissal of a complaint by a plaintiff, Rule 41(a), states that a plaintiff may voluntarily dismiss his own case without court order if he files a notice of dismissal before the adverse party serves an answer or motion for summary judgment. In the instant docket, Johnson has filed an answer, a counterclaim and a motion for summary judgment. However, this rule however, pertains only to dismissals without prejudice. In this case, SFG has requested to withdraw its complaint with prejudice.

The court in *Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (1969) addressed the issue of a voluntary dismissal with prejudice. The court stated:

"Any time a plaintiff offers to dismiss with prejudice, the attorney for the party against whom the dismissal is sought has no grounds for objecting when his client's rights are protected. In fact, when a lawyer is retained by a client to defend a lawsuit, his ultimate aim is to procure a dismissal with prejudice or a favorable verdict. We

1       therefore hold a plaintiff has an absolute right to a voluntary dismissal of his  
2       complaint with prejudice. *Id.* at 154.

3       In the instant case, Staff believes that Johnson's counterclaim could stand on its own as a  
4       complaint. Johnson would not be prejudiced by the withdrawal of the SFG complaint; Johnson's  
5       counterclaim would survive. As the counterclaim relates to a billing dispute, Staff would argue that  
6       the Commission has concurrent jurisdiction with the Superior Court to protect Johnson's rights.  
7       Johnson would not be left without a forum to assert its rights with the withdrawal of the complaint by  
8       SFG.

9       In this instance, there may be concurrent jurisdiction with the Superior Court. The doctrine of  
10      primary jurisdiction is a discretionary rule created by the courts to effectuate the efficient handling of  
11      cases in specialized areas where agency expertise may be useful. *Campbell v. Mountain States Tel. &*  
12      *Tel. Co.* 120 Ariz. 426, 586 P.2d 987 (Ariz.App.,1978). In *Tucson Gas, Electric Light & Power Co.*  
13      *v. Trico Electric Coop., Inc.*, 2 Ariz.App. 105, 406 P.2d 740 (1965), the Court refused to find primary  
14      jurisdiction in the Commission, and affirmed the jurisdiction of the court to enjoin the invasion by  
15      one public service corporation of the certificated area of another. While not expressly using the term  
16      "primary", the Supreme Court held in *Trico Electric Cooperative v. Ralston*, 67 Ariz. 358, 196 P.2d  
17      470 (1948) that the construction of a contract and the determination of its validity are judicial  
18      functions for the courts, not the Commission.

19      Johnson's counterclaims involve an alleged billing dispute. While the Commission's  
20      ratemaking authority is exclusive and plenary, at least one court has held that billing does not  
21      implicate ratemaking.<sup>1</sup> In that instance, the Superior Court may likely have jurisdiction over the  
22      billing dispute, thus insuring that Johnson's rights are protected. As noted by Judge Dunevant in the  
23      Minute Order dated May 27, 2008, "Regardless of whether this Court has concurrent jurisdiction, the  
24      Court is of the opinion that it should refrain from becoming involved until the Corporation  
25      Commission has made its initial determination." With a voluntary dismissal with prejudice, there has  
26      been a "determination" and the rights of the parties could be adjudicated in Superior Court.


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28      <sup>1</sup> See *U.S. West Communications, Inc. v. Arizona Corp. Com'n*, 197 Ariz. 16, 3 P.3d. 936 (Ariz. App. 1999). The court  
disagreed with the Commission's assertion that the billing and collections implicate ratemaking, stating that billing and  
payment terms apply after rates have already been established.

1 Staff has no objection to the voluntary dismissal, with prejudice, of the SFG complaint.

2 RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of October, 2011.

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11 Original and thirteen (13) copies  
12 of the foregoing were filed this  
13 11<sup>th</sup> day of October, 2011 with:

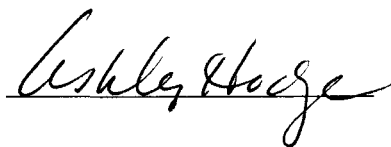
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19 and/or emailed this 11<sup>th</sup> day of October, 2011 to:

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